IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RAHIM ABDULLAH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N18C-12-013 CEB
	)	
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,	)	
	)	
Defendant.	)	

Submitted: March 31, 2022
Decided: April 13, 2022

Upon Consideration of Defendant's Motion to Enter Judgment,
GRANTED.

MEMORANDUM OPINION

Tyler Sacchetta, Esquire, SACCHETTA & BALDINO, Wilmington, Delaware. *Attorney for Plaintiff Rahim Abdullah*.

Arthur D. Kuhl, Esquire, REGER RIZZO & DARNALL LLP, Wilmington, Delaware. *Attorney for Defendant Allstate Property and Casualty Insurance Company*.

BUTLER, R.J.

The basic question here is this: When an underinsured motorist ("UIM") claim results in a plaintiff's verdict, but at an amount less than the damages paid by the tortfeasor, who is the "prevailing party"?

BACKGROUND

Plaintiff Rahim Abdullah was injured in a rear-end auto accident. The striking vehicle was insured in the amount of $25,000. Plaintiff received that amount pre-trial. But he wanted more. So he sought UIM damages from his own insurer, Defendant Allstate. Defendant disputed that Plaintiff's damages exceeded $25,000.

The case proceeded to trial. At trial, the parties assiduously avoided any reference to the $25,000 amount the tortfeasor paid. And in their instructions, the jury was specifically *not* told what or how much the tortfeasor (or his insurer) had paid to Plaintiff. No one objected to the jury instructions.[1]

The parties agreed that the first $25,000 in damages awarded would be offset by the tortfeasor's $25,000 payment. As a result, recovery on the policy's UIM provision (*i.e.*, $15,000) would not be available unless the jury awarded at least $25,001 in damages. It did not.

[1] The parties' approach to concealing the settlement figure reflects the principle that the jury in a UIM case may not adjudicate damages using evidence of past payments from a collateral source (*e.g.*, the tortfeasor). *E.g.*, *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053–57 (Del. 2010).

The jury awarded Plaintiff $20,000—$5,000 less than Plaintiff had already received in his settlement with the tortfeasor. Defendant now asks the Court to enter a judgment in its favor because the award was less than the settlement amount and so, the tortfeasor was not "underinsured."

Why all the fuss about who prevailed at trial? Although not stated by the parties, the most logical explanation is that each would like to file (or resist) a motion for costs under Rule 54.[2] Although that may be a coming attraction, the Court's only task here is to determine who prevailed. This is a question of law[3] answered below.

DISCUSSION

A. The prevailing party in a UIM case must prove damages at an amount sufficient to trigger a liability for payment.

The Court begins with the cases cited in the parties' supplemental briefing.

In *Graham v. Keene Corp.*,[4] the plaintiffs obtained an asbestos verdict that awarded them $107,500. But because of contributions into a settlement fund by other defendants, the plaintiffs' damages were insufficient to overcome set offs that, by statute,[5] reduced defendant's financial liability to zero. The Delaware Supreme Court held that notwithstanding the statutory setoff—and consequent lack of financial liability of the defendant—the plaintiffs were the prevailing parties. The

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[2] *See* Del. Super. Ct. Civ. R. 54(d).
[3] *See, e.g.*, *Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 992).
[4] 616 A.2d 827 (Del. 1992).
[5] *See* 10 *Del. C.* § 6304(a) (1995).

Court found that defendant's statutory right to setoff was no reason to reverse the traditional principle that the award, not its satisfaction, determines who prevails.

In *Streetie v. Progressive Classic Ins. Co.*,[6] the plaintiff, an injured motorist, settled with the tortfeasor's insurer for the $25,000 policy limit. Claiming this was insufficient to compensate her fully, she sued her insurer for UIM coverage. The jury only awarded her $9,179, which equated to her actual medical expenses, but was well below the amount she had received from the settlement. In denying a new trial, the Court ruled that "Plaintiff has obtained no judgment from the Defendant and Defendant is indeed the prevailing party for purposes of Rule 54(d)."[7] At least at first blush, the *Streetie* decision appears to conflict with *Graham*.

Finally, in C*ooke v. Murphy*,[8] the jury found for the Plaintiff in a vehicle collision case, but awarded no damages at all. The Court entered judgment for the defense, making the defendant the prevailing party.[9] *Cooke* was affirmed by the Supreme Court, which noted that other jurisdictions have ruled to the same effect.[10]

In seeking a unifying theme to these disparate holdings, we would do well to return to basics. UIM cases have both contract and tort elements. Proving a contract

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[6] 2011 WL 1259809 (Del. Super. Ct. April 4, 2011), *aff'd*, 2011 WL 6307823 (Del. Dec. 13, 2011).
[7] *Id.* at *15.
[8] 2013 WL 6916941 (Del. Super. Ct. Nov. 26, 2013), *aff'd*, 2014 WL 3764177 (Del. July 30, 2014),
[9] *Id.* at *3.
[10] *Cooke*, 2014 WL 3763177 at *3.

claim or a tort claim requires proof of damages. Accordingly, in UIM cases, failure to demonstrate damages at an amount triggering the defendant's liability for payment is dispositive of prevailing party status.

B. Plaintiff failed to prove damages at an amount sufficient to trigger Defendant's liability for payment.

A successful negligence case requires proof of (1) duty; (2) breach; (3) causation; and (4) damages.[11] In *Graham*, a non-UIM case, the plaintiff proved all these elements. So the Court held the plaintiffs were the prevailing parties notwithstanding their lack of financial recovery. In contrast, the *Cooke* plaintiff failed to prove damages, and thus he was not the prevailing party.

In determining the statute of limitations for a UIM claim, the Supreme Court observed that "an action by an insured against his automobile insurance carrier to recover uninsured motorist benefits essentially sounds in contract rather than in tort."[12] A successful contract action requires proof of (1) a contractual duty; (2) breach; and (3) damages.[13] While the Supreme Court has acknowledged the sometimes twisting elements of UIM claims that cross both tort and contract law,[14] it is clear that damages are an essential element of both tort and contract cases.

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[11] *E.g.*, *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2010).
[12] *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982).
[13] *E.g.*, *VLIW Tech., LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003).
[14] *See, e.g.*, *Rapposelli v. State Farm Mut. Auto Ins. Co.,* 988 A.2d 425, 428–29 (Del. 2010).

Streetie's holding harmonizes the cases discussed by the parties. *Streetie* held that the failure to obtain a jury verdict above the amount paid by the tortfeasor does not trigger UIM "damages" to be paid by the defendant insurer. The Court believes this is the better reasoned rule. Here, then, Plaintiff had to prove, and the jury had to return, damages at a sufficient amount to trigger Defendant's liability to pay. Plaintiff failed to do so. Accordingly, judgment must be entered for Defendant.

CONCLUSION

For the foregoing reasons, Defendant's motion for entry of judgment is **GRANTED**.

IT IS SO ORDERED.

Charles E. Butler, Resident Judge